

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DIANA L. BICKHAM,	)
	) No. CV-09-5039-JPH
Plaintiff,	)
	) ORDER GRANTING PLAINTIFF'S
v.	) MOTION FOR SUMMARY JUDGMENT
	) AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner	) PROCEEDINGS
of Social Security,	)
	) (Ct. Rec. 15)
Defendant.	)
	)
	)

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on August 13, 2010 (Ct. Rec. 15, 17). Attorney Thomas A. Bothwell represents plaintiff; Special Assistant United States Attorney Benjamin Groebner represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge (Ct. Rec. 6). On July 26, 2010, plaintiff filed a reply (Ct. Rec. 19). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** plaintiff's motion for summary judgment (Ct. Rec. 15) and **REVERSES AND REMANDS** pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings. The court **DENIES** defendant's motion for summary judgment (Ct. Rec. 17).

**JURISDICTION**

Plaintiff protectively applied for supplemental security

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1 income (SSI) on August 26, 2002, alleging disability since January  
2 1, 2000, due to insulin dependent diabetes mellitus with  
3 peripheral neuropathy, hepatitis C, degenerative arthritis,  
4 hypertension, sleep apnea, obesity, anxiety and depression (Tr.  
5 365-366; Tr. 125-127 - October 2006 application). Her applications  
6 were denied initially and on reconsideration.

7 Administrative Law Judge (ALJ) James P. Berry held a hearing  
8 March 8, 2004 (Tr. 939-964). On June 16, 2004, He issued an  
9 unfavorable decision (Tr. 92-96). The Appeals Council ordered a  
10 remand consolidating plaintiff's applications and directing the  
11 ALJ to enter a new decision based on all the evidence (Tr. 16,  
12 referring to remand order at 101-103).

13 After remand the ALJ held hearings August 22, 2007, November  
14 28, 2007, and March 5, 2008 (Tr. 967-987, 990-999, 1002-1021).  
15 Plaintiff, represented by counsel, medical expert Harold Mills,  
16 M.D., and vocational experts testified. On March 25, 2008, the ALJ  
17 issued an unfavorable decision (Tr. 16-27). On April 6, 2009, the  
18 Appeals Council denied review (Tr. 8-10). Therefore, the ALJ's  
19 decision became the final decision of the Commissioner, which is  
20 appealable to the district court pursuant to 42 U.S.C. § 405(g).  
21 Plaintiff filed this action for judicial review pursuant to 42  
22 U.S.C. § 405(g) on June 8, 2009 (Ct. Rec. 2, 4).

#### 23 **STATEMENT OF FACTS**

24 The facts have been presented in the administrative hearing  
25 transcripts, the ALJ's decision, the briefs of both parties, and  
26 are summarized here.

27 Ms. Bickham was 42 years old when she applied for benefits

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(Tr. 26). She has a seventh grade education and has worked in a deli as a sandwich maker (Tr. 134, 139, 993-994). Plaintiff lives with her daughter. She testified she watches television, washes dishes, and dusts, but two to three days a week she is in bed most of the day (Tr. 26). Ms. Bickham can walk a half block, stand 15 minutes with a cane, and sit 30 minutes (Tr. 25). She testified at the August 2007 hearing she had been depressed for two years (Tr. 26).

#### SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person

1 is engaged in substantial gainful activities. If so, benefits are  
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
3 the decision maker proceeds to step two, which determines whether  
4 plaintiff has a medically severe impairment or combination of  
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If plaintiff does not have a severe impairment or combination  
7 of impairments, the disability claim is denied. If the impairment  
8 is severe, the evaluation proceeds to the third step, which  
9 compares plaintiff's impairment with a number of listed  
10 impairments acknowledged by the Commissioner to be so severe as to  
11 preclude substantial gainful activity. 20 C.F.R. §§  
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
13 App. 1. If the impairment meets or equals one of the listed  
14 impairments, plaintiff is conclusively presumed to be disabled. If  
15 the impairment is not one conclusively presumed to be disabling,  
16 the evaluation proceeds to the fourth step, which determines  
17 whether the impairment prevents plaintiff from performing work  
18 which was performed in the past. If a plaintiff is able to perform  
19 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§  
20 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
21 residual functional capacity ("RFC") assessment is considered. If  
22 plaintiff cannot perform this work, the fifth and final step in  
23 the process determines whether plaintiff is able to perform other  
24 work in the national economy in view of plaintiff's residual  
25 functional capacity, age, education and past work experience. 20  
26 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
27 482 U.S. 137 (1987).

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1 The initial burden of proof rests upon plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. The burden  
7 then shifts, at step five, to the Commissioner to show that (1)  
8 plaintiff can perform other substantial gainful activity and (2) a  
9 "significant number of jobs exist in the national economy" which  
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
11 Cir. 1984).

#### 12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a  
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
15 the Commissioner's decision, made through an ALJ, when the  
16 determination is not based on legal error and is supported by  
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
18 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
19 "The [Commissioner's] determination that a plaintiff is not  
20 disabled will be upheld if the findings of fact are supported by  
21 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
22 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
23 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
24 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
27 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such

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1 evidence as a reasonable mind might accept as adequate to support  
2 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
3 (citations omitted). "[S]uch inferences and conclusions as the  
4 [Commissioner] may reasonably draw from the evidence" will also be  
5 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
6 review, the Court considers the record as a whole, not just the  
7 evidence supporting the decision of the Commissioner. *Weetman v.*  
8 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
9 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to  
11 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
12 evidence supports more than one rational interpretation, the Court  
13 may not substitute its judgment for that of the Commissioner.  
14 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
15 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
16 evidence will still be set aside if the proper legal standards  
17 were not applied in weighing the evidence and making the decision.  
18 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
19 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
20 support the administrative findings, or if there is conflicting  
21 evidence that will support a finding of either disability or  
22 nondisability, the finding of the Commissioner is conclusive.  
23 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 24 **ALJ'S FINDINGS**

25 At step one the ALJ found plaintiff did not engage in  
26 substantial gainful activity after onset on January 1, 2000 (Tr.  
27 18). At steps two and three, ALJ Berry found plaintiff suffers

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1 from insulin dependent diabetes mellitus, hypertension, and sleep  
2 apnea, impairments that are severe but which do not alone or  
3 combination meet or medically equal a Listed impairment (Tr. 18,  
4 20). He found plaintiff less than completely credible (Tr. 19-20).  
5 At step four, relying on the VE, the ALJ found plaintiff cannot  
6 perform her past work (Tr. 26). At step five, again relying on the  
7 VE, he found she could perform other jobs such as charge account  
8 clerk, microfilming document preparer, and ticket checker (Tr. 26-  
9 27, 1018). Because the ALJ found plaintiff could perform other  
10 work, she is not disabled as defined by the Social Security Act  
11 (Tr. 27).

#### 12 ISSUES

13 Plaintiff alleges the ALJ erred when he weighed the evidence  
14 of psychological and physical impairment, the lay witness  
15 statements by Ms. Bickham's daughter, assessed credibility, and  
16 determined plaintiff's RFC (Ct. Rec. 16 at 11-21). The  
17 Commissioner answers the Court should affirm the decision because  
18 it is supported by the evidence and free of harmful error (Ct.  
19 Rec. 18 at 3-4).

20 The second issue is determinative. ALJ erred by rejecting lay  
21 witness evidence without comment. The error is harmful and  
22 therefore dispositive.

#### 23 DISCUSSION

##### 24 A. Lay witness evidence

25 Plaintiff alleges the ALJ failed to properly weigh statements  
26 given by a lay witness (Ct. Rec. 16 at 18). Ms. Bickham's  
27 daughter, Jeannie Ramos, also known as Jeannie Lang, submitted

1 reports dated December 2 and December 20, 2006 (Tr. 149-164). The  
2 Commissioner admits the ALJ failed to discuss this evidence.

3 In determining disability an ALJ must consider lay witness  
4 testimony concerning a claimant's ability to work. *Bruce v.*  
5 *Astrue*, 557 F.3d 1113, 1115 (9<sup>th</sup> Cir. 2009). If an ALJ disregards  
6 lay witness testimony he must provide reasons "that are germane to  
7 each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir.  
8 1996). The ALJ's reasons must be specific. *Stout v. Comm'r*, 454  
9 F.3d 1050, 1054 (9<sup>th</sup> Cir. 2006).

10 When Ms. Ramos made her statements she lived with plaintiff.  
11 She states Ms. Bickham remains in bed all day; her activities are  
12 limited to sleeping, showering, and eating (Tr. 149); she suffers  
13 mood swings and an anger problem; has bad knees, and can only walk  
14 from a half block to two blocks (Tr. 149, 154, 162).

15 The Commissioner asserts because the objective evidence does  
16 not support a severe knee impairment, any error by the ALJ in  
17 failing to address Ms. Ramos's opinion is harmless because it  
18 would not change the result. The argument is flawed in at least  
19 two respects.

20 First, Ms. Ramos describes limitations other than knee pain  
21 and lack of mobility. She refers to mental symptoms, including  
22 "bad mood changes," an anger problem, paranoia, and plaintiff  
23 hearing voices. Ms. Ramos indicates plaintiff talks to herself  
24 (Tr. 152, 154-156). The lack of supporting evidence of a severe  
25 knee impairment is inapposite to the described mental limitations.

26 Similarly, Ms. Ramos describes other physical limitations  
27 which, if true, reflect incapacitating limitations. As noted, Ms.

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1 Ramos indicates plaintiff's daily activities are limited to  
2 showering, eating and sleeping (Tr. 149), but Ms. Ramos states at  
3 times plaintiff is apparently able to shop in stores, pay bills,  
4 and use public transportation (Tr. 152, 160). Ms. Ramos states her  
5 mother is "off balance," unable to stand for long periods, and  
6 falls a lot (Tr. 156). Ms. Ramos indicates plaintiff is "hardly"  
7 able to read and "can't read or write"; suffers incontinence (of  
8 inconsistently described frequency); drops food, needs help  
9 showering, and wakes hourly. Ms. Ramos cares for plaintiff (Tr.  
10 154, 156-158, 164).

11 The ALJ's error is not harmless because if the lay witness's  
12 description of plaintiff's functioning is accepted as true, it  
13 would support finding plaintiff disabled.

14 Second, the Commissioner errs because the ALJ in this case  
15 disregarded the lay testimony without comment. The court is left  
16 to guess why he may have rejected the opinion. In determining  
17 whether a claimant is disabled, an ALJ *must* consider lay witness  
18 testimony concerning a claimant's ability to work. *Bruce v.*  
19 *Astrue*, 557 F.3d 1113, 1115 (9<sup>th</sup> Cir. 2009); *Stout v. Comm'r*, 454  
20 F.3d 1050, 1053 (9<sup>th</sup> Cir. 2006). Such testimony is competent  
21 evidence and "cannot be disregarded without comment." If an ALJ  
22 disregards the testimony of a lay witness, he must provide  
23 specific and germane reasons. *Bruce*, 557 F.3d at 1115, citing  
24 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996); *Stout*, 454  
25 F. 3d at 1054 (emphasized in *Bruce*).

26 The ALJ erred by disregarding the lay witness's statements  
27 without comment. Regardless of whether they are interested

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1 parties, "friends and family members in a position to observe a  
2 claimant's symptoms and daily activities are competent to testify  
3 as to [his or] her condition." *Valentine v. Comm'r of Soc. Sec.*  
4 *Admin.*, 574 F.3d 685, 694 (9<sup>th</sup> Cir. 2009), citing *Dodrill v.*  
5 *Shalala*, 12 F.3d 915, 918-919 (9<sup>th</sup> Cir. 2009).

6 The ALJ, not the district court, is required to provide  
7 specific reasons for rejecting lay testimony. *Bruce*, 557 F.3d at  
8 1115, citing *Stout*, 454 F.3d at 1054.

9 Plaintiff is correct. The ALJ erred by disregarding Ms.  
10 Ramos's statements without comment. And the error is harmful.  
11 Because this issue is dispositive the court grants plaintiff's  
12 motion and orders the ALJ to consider the following on remand.

13 **B. Step two**

14 Plaintiff alleges the ALJ should have found her mental  
15 impairments and resulting limitations severe at step two.

16 In social security proceedings, the claimant must prove the  
17 existence of a physical or mental impairment by providing medical  
18 evidence consisting of signs, symptoms, and laboratory findings;  
19 the claimant's own statement of symptoms alone will not suffice.  
20 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
21 on the basis of a medically determinable impairment which can be  
22 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
23 medical evidence of an underlying impairment has been shown,  
24 medical findings are not required to support the alleged severity  
25 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
26 1991).

27 An impairment or combination of impairments may be found "not

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1 severe only if the evidence established a slight abnormality that  
2 has no more than a minimal effect on an individual's ability to  
3 work." *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9<sup>th</sup> Cir.  
4 2005)(citing *Smolen v. Chater*, 433 F.3d 1273, 1290 (9<sup>th</sup> Cir.  
5 1996); see also *Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir.  
6 1988). If an adjudicator is unable to determine clearly the effect  
7 of an impairment or combination of impairments on the individual's  
8 ability to do basic work activities, the sequential evaluation  
9 should not end with the not severe evaluation step. S.S.R. 85-28  
10 (1985). Step two, then, is "a de minimus screening device [used]  
11 to dispose of groundless claims," *Smolen*, 80 F.3d at 1290, and an  
12 ALJ may find that a claimant lacks a medically severe impairment  
13 or combination of impairments only when his conclusion is "clearly  
14 established by the medical evidence." S.S.R. 85-28. The question  
15 on review is whether the ALJ had substantial evidence to find that  
16 the medial evidence clearly established that the claimant did not  
17 have a medically severe impairment or combination of impairments.  
18 *Webb*, 433 F.3d at 687; see also *Yuckert*, 841 F.2d at 306.

19 The evidence of mental impairment plaintiff points to  
20 includes the January 2007 opinion of examining psychologist Greg  
21 Hirokawa, Ph.D., and an unnamed (presumably) consultative  
22 professional (Ct. Rec. 16 at 12-23; Tr. 313-315, 320-325). At  
23 times it appears Boyd Johnson, M.D., treated plaintiff for anxiety  
24 and depression.

25 On remand the ALJ should utilize the services of a testifying  
26 psychologist to clarify whether plaintiff suffers from a severe  
27 mental impairment as defined by the Act. As the ALJ acknowledges,

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1 when Dr. Mills testified he did not address depression and anxiety  
2 (Tr. 19). Examining psychologist Dr. Hirokawa diagnosed depressive  
3 disorder NOS, personality disorder NOS, and rule out low-average  
4 intellectual functioning. He opined plaintiff's mental health  
5 limitations are mild in every category, except she is mildly to  
6 moderately limited in the ability to interact with coworkers (Tr.  
7 324-325). On remand the ALJ should discuss the assessed limitation  
8 and if necessary obtain further testing on the rule out diagnosis.

9 *1. Substance abuse (DAA)*

10 Dr. Hirokawa notes plaintiff has been arrested for DUI. She  
11 has never received treatment for substance abuse despite drinking  
12 and occasionally using valium and speed from 1979 until 1984 (Tr.  
13 320-322). The ALJ observes plaintiff "did not report her recent  
14 problems with prescription painkillers" to Dr. Hirokawa (Tr. 19).  
15 Treating source Dr. Johnson indicates plaintiff has used methadone  
16 daily at times (see e.g., Tr. 181-195)(March-July 2007). In  
17 addition to past references to IV drug use leading to hepatitis C,  
18 there are several more recent references to DAA and drug seeking  
19 behavior. The ALJ notes in March 2004 [about four years after  
20 onset], Dr. Johnson diagnosed opiate dependence because plaintiff  
21 used narcotics for many years. During the summer of 2004, Ms.  
22 Bickham admitted "using oxycontin off the street" (Tr. 21-22). In  
23 June 2006, she lost a vicodin prescription two days after it was  
24 written (Tr. 23, Exhibit 23F/24). In July 2006, Dr. Johnson  
25 questioned whether she was abusing prescription medication (Tr.  
26 23, Exhibit 23F/19).

27 On remand, the ALJ will consider at step two whether

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1 substance abuse is a severe impairment. If the ALJ determines  
2 plaintiff is disabled and substance abuse is a severe impairment,  
3 he will perform the additional five step sequential evaluation to  
4 determine if substance abuse materially contributes to the  
5 disability determination.

6 *2. Additional physical impairments*

7 At step two the ALJ found plaintiff suffers from the severe  
8 impairments of diabetes, hypertension and sleep apnea. He found  
9 asthma, COPD, hepatitis C, and substance abuse non-severe.

10 The ALJ erred at step two by relying on the testifying  
11 expert's definition of a severe impairment as "potentially life-  
12 threatening"(Tr. 19). On remand the ALJ will consider at step two  
13 whether plaintiff suffers from any other medically severe physical  
14 impairment or combination of impairments by relying on C.F.R. §§  
15 404.1520(a)(4)(ii), 416.920(a)(4)(ii); *Webb v. Barnhart*, 433 F.3d  
16 683, 686-687 (9<sup>th</sup> Cir. 2005); *Smolen v. Chater*, 80 F.3d 1273, 1298  
17 (9<sup>th</sup> Cir. 1996); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir.  
18 1998), and S.S.R. 85-28.

19 It is the role of the trier of fact, not this Court, to  
20 resolve conflicts in evidence. *Richardson v. Perales*, 402 U.S.  
21 389, 400 (1971). A decision supported by substantial evidence  
22 will be set aside if the proper legal standards were not applied  
23 in weighing the evidence and making the decision. *Browner v.*  
24 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup>  
25 Cir. 1987).

26 The court wishes to make clear it expresses no opinion as to  
27 what the ultimate outcome on remand will or should be. The

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1 Commissioner is free to give whatever weight to the additional  
2 evidence he deems appropriate. *Sample v. Schweiker*, 694 F.2d 639,  
3 642 (9<sup>th</sup> Cir 1982)("[Q]uestions of credibility and resolution of  
4 conflicts in the testimony are functions solely of the  
5 Secretary.")

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's conclusions, this  
8 Court finds the ALJ's decision contains harmful legal error  
9 requiring remand for additional proceedings. .

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
12 **GRANTED**. The decision is **REVERSED** and **REMANDED** pursuant to  
13 **sentence four** for further administrative proceedings.

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 11**) is  
15 **DENIED**.

16 The District Court Executive is directed to file this Order,  
17 provide copies to counsel for Plaintiff and Defendant, enter  
18 judgment in favor of Plaintiff, and **CLOSE** this file.

19 DATED this 27th day of August, 2010.

20  
21 s/ James P. Hutton

22 JAMES P. HUTTON  
23 UNITED STATES MAGISTRATE JUDGE  
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